ESSAY

THE STATE SECRETS PRIVILEGE AND SEPARATION OF POWERS

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INTRODUCTION

Since September 11, 2001, George W. Bush's Administration has repeatedly asserted the state secrets privilege as grounds for the dismissal of civil cases challenging the legality of its conduct in the war on terror. Specifically, the executive has sought dismissal of all cases concerning two different government programs: the "extraordinary rendition" program, under which the executive removes suspected terrorists to foreign countries for interrogation; and the National Security Agency's warrantless wiretapping of communications by suspected terrorists. The executive argues that these cases raise legal challenges that can neither be proven nor defended against without disclosure of information that would jeopardize national security, and thus it seeks to have all cases related to these programs dismissed on the pleadings. The district courts have split on the issue, and these cases appear to be quickly heading for appellate, and possibly U.S. Supreme Court, review.[1]

The plaintiffs in these cases have responded to the executive's invocation of the privilege with two primary counterarguments: First, they assert that the cases must go forward to remedy past violations of their individual constitutional rights and enjoin ongoing violations; and second, they argue

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1. Al-Haramain Islamic Found., Inc. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006) (denying the government's motion to dismiss a challenge to the National Security Agency's (NSA's) warrantless wiretapping program on state secrets grounds); ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (same); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006) (granting the government's motion to dismiss a challenge to the NSA's warrantless wiretapping program on state secrets grounds); Hepting v. AT&T, Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006) (denying the government's motion to dismiss a challenge to the NSA's warrantless wiretapping program on state secrets grounds); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (granting the government's motion to dismiss legal claims arising from extraordinary rendition on state secrets grounds).

that requiring courts to dismiss all such cases in which the executive broadly asserts the state secrets privilege is an unwarranted usurpation of judicial power.[2] Although these are legitimate grounds on which to oppose the executive's motions to dismiss, this Essay raises a third objection that has not been discussed by the litigants: the executive's incursion on legislative authority to assign federal court jurisdiction.[3]

The Constitution gives Congress near-plenary power to decide which kinds of Article III cases and controversies federal courts shall hear,[4] and throughout most of this nation's history Congress has chosen to confer jurisdiction over a wide variety of legal claims against the federal government.[5] Accordingly, when the executive successfully argues that a federal court must dismiss whole categories of cases over which Congress has assigned jurisdiction, it intrudes not just on the power of courts and the rights of individuals, but on the jurisdiction-conferring authority of the legislature as well.

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2. *See infra* Part I. Academic discussion of the privilege has also focused on its effect on individual rights and judicial power. *See, e.g.*, Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 258 (2006) ("Broad deference by the courts to the executive branch, allowing an official to determine what documents are privileged, undermines the judiciary's duty to assure fairness in the courtroom and to decide what evidence may be introduced."); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. (forthcoming 2007) (manuscript at 19), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946676 ("[T]he privilege has the capacity to prevent courts from engaging the most significant constitutional issue underlying the post-9/11 legal debate: whether and to what extent recognition of an armed conflict with al Queda permits the executive branch to act at variance with the framework of laws that otherwise restrain its conduct."); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 90 (2005) ("[T]he privilege, as now construed, obstructs the constitutional duties of courts to oversee executive action.").

3. Of course, the state secrets privilege is not the only method by which the executive can seek to dismiss cases challenging executive conduct from a court's docket. In recent litigation, the executive has raised many different grounds for dismissal of cases challenging its conduct in the war on terror, including claims that the courts lack jurisdiction over such cases. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2762-70 (2006) (discussing the executive's assertion that the Detainee Treatment Act stripped the federal courts of jurisdiction over habeas corpus petitions filed by Guantanamo Bay detainees). Academics have also argued that the courts lack the institutional competence to oversee national security and foreign policy, and thus should play a limited role in such cases. John Yoo, *Courts at War*, 91 Cornell L. Rev. 573, 590-600 (2006). Although this Essay focuses on the executive's assertion of the state secrets privilege, its conclusions would apply to the executive's other grounds for seeking immediate dismissal of litigation challenging its course of conduct in the war on terror.

4. *See infra* Part II; *see also* Richard H. Fallon, Jr., et al., Hart & Wechsler's The Federal Courts and the Federal System 319-22, 330-45 (5th ed. 2003).

5. *See* Fallon, et al., *supra* note 4, at 35-36 (describing the Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198, which provided for the removal of suits against federal officers from state to federal courts, and the Judiciary Act of 1875, ch. 137, 18 Stat. 552 (current version at 28 U.S.C. §§ 1331, 1332 (2000)), which gave the federal courts jurisdiction over all civil cases "arising under" federal law and satisfying an amount-in-controversy requirement). Today, 28 U.S.C. § 1331 grants district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Furthermore, by seeking dismissal of these cases, the executive is stripping Congress of its ability to collaborate with the judiciary to curb executive power. The constitutional scheme of separated powers not only permits one branch, acting on its own, to check the others; it also allows two branches to work together to keep the third in line.[6] By giving federal courts the authority to hear cases challenging the use of executive power, Congress is enlisting the courts as its partner in executive oversight. When the judicial branch is considering whether to dismiss cases challenging executive action at the executive's behest, it should therefore be cognizant that dismissal undermines the cooperation between courts and Congress, and may leave the executive unchecked and unmonitored by any branch of government.

The executive itself has recognized that Congress has a role to play in these cases. In its motions to dismiss on state secrets grounds, the executive has argued that Congress is the more appropriate institution to review the constitutionality of executive action. For example, in *ACLU v. NSA*,[7] a case challenging the National Security Agency's (NSA's) practice of warrantless wiretapping, the government sought dismissal but noted, "This is not to say there is no forum to air the weighty matters at issue, which remains a matter of considerable public interest and debate, but that the resolution of these issues must be left to the political branches of government."[8] The executive appears to be suggesting that the court should dismiss the case because Congress is capable of policing the executive on its own.

As a threshold matter, the executive's claim that the "political branches," and not the courts, must resolve the issues raised in the litigation ignores the fact that one of the political branches—Congress—gave federal courts the authority to hear suits against the executive for constitutional violations. In other words, that the court has jurisdiction over the case *is* one political branch's method of addressing the problem. Admittedly, however, that logic only goes so far. Congress grants federal courts jurisdiction over broad categories of cases, and it might agree with the executive that a subcategory of those cases involving state secrets should be dismissed. Maybe Congress would prefer that sensitive matters of national security be resolved in another forum—closed-door congressional hearings, for example—as the executive seems to suggest in its motions asserting the privilege. If so, however, then it would seem that judges should not simply dismiss these cases, but should instead insist on some proof that Congress would approve and, just as important, would take over executive branch oversight if the courts bow out.

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6. *See infra* Part II.

7. 438 F. Supp. 2d 754 (E.D. Mich. 2006).

8. Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Summary Judgment at 49, *ACLU*, 438 F. Supp. 2d 754 (No. 10204) [hereinafter Memorandum in Support of the Military and State Secrets Privilege].

In this Essay, I explore why courts should be cognizant of the effect of a dismissal on legislative, as well as judicial, power, and how courts should respond to the executive's claims that these issues "must be left to the political branches of government." My tentative conclusion is that when the executive makes such claims, courts should not take its assertions at face value, but rather should determine whether Congress would be willing to assume the oversight function through investigation of executive action. Judges should assure themselves that the executive is, in fact, acceding to congressional demands for information about the challenged conduct, and is fully cooperating with the legislative committees seeking to monitor its conduct. Only if satisfied that Congress is holding the executive accountable should the judiciary be willing to forgo hearing whole categories of cases challenging executive authority.

These proposed responses to the executive's blanket motions to dismiss are grounded in a functional theory of separation of powers, and follow from the widely accepted view that each branch's power fluctuates in accord with the actions of the other two. Functionalists contend that there are no bright lines demarcating the roles of the three branches; their powers are shared, so that oftentimes one branch must obtain another's approval before acting. In his iconic concurrence in the *Steel Seizure* case, Justice Robert H. Jackson—the ultimate functionalist—explained that the President's authority is greatest when he has the express approval of Congress, and is at its "lowest ebb" when he acts contrary to a legislative prohibition.[9] Under Jackson's conception of the separation of powers, the roles of the three branches of government are not rigidly defined, but rather are flexible, shifting to accommodate the positions taken by the others.[10]

The commingling of executive, legislative, and judicial power is usually viewed as a means of limiting each branch's authority to take action. But the three branches can also collaborate to prevent the overreaching of a third. The same fluctuations observed by Justice Jackson in the context of an executive power grab should apply when the branches are sharing the burden of executive oversight. That is, the role of the judiciary in curbing executive power should depend, in part, on whether Congress can do so in the court's stead. If Congress is engaged in oversight, then the judiciary may step aside; if, however, Congress is unable or unwilling to take on that task, then the judiciary's role in checking executive power is paramount. Accordingly, I suggest that the judiciary has an obligation to ascertain Congress's willingness and ability to engage in executive oversight before granting blanket dismissals of cases challenging the constitutionality of executive conduct.

The Essay proceeds in three parts. Part I provides an overview of the state secrets privilege and a brief description of the categories of cases that

9. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

10. *See infra* Part II.

the executive has recently claimed must be dismissed by federal courts on the basis of that privilege. This part also discusses how the Bush Administration's assertion of the privilege differs from past practice. Part II explains why the judiciary should take into account the effect of dismissal not just on its own constitutional role and on the plaintiff's ability to vindicate his or her individual rights, but also on the legislative power to assign jurisdiction and delegate executive oversight to the federal courts. I contend that if courts fail to take the usurpation of legislative power into account, they are overlooking a key component of the Constitution's tripartite system of government: the ability of two branches to work together to check the excesses of the third. Part III moves from these observations to concrete suggestions about how courts should react to an executive claim that all cases challenging the constitutionality of certain executive programs should be dismissed and left for the "political branches" to resolve. I propose that when the executive makes such a blanket assertion of the privilege, the judiciary should not forgo the exercise of jurisdiction unless it is satisfied that Congress will take over the task of executive oversight.

Finally, a caveat. This is an essay in the original sense of the word, in that it tests out theories and suggests solutions without providing exhaustive background or addressing every objection or concern that could be raised.[11] Due to the limits of space and time, this Essay can only start a conversation about how courts should respond to the executive's attempts to dismiss cases on state secrets grounds. I hope to return to the ideas first raised here in greater detail in articles to come, but it seems important to begin the discussion now in light of the dozens of pending cases in which the executive has invoked this privilege. In the meantime, I welcome others who wish to join the conversation as either critics or proponents of the tentative theories and proposals expressed in the pages that follow.

I. EXECUTIVE ASSERTION OF THE STATE SECRETS PRIVILEGE

A. *History of the State Secrets Privilege*

The state secrets privilege is a common law evidentiary privilege that derives from the President's authority over national security, and thus is imbued with "constitutional overtones."[12] It protects information that

11. One definition of "essay" is a "trial" or "test." Oxford English Dictionary 399 (2d ed. 1989). The French word "essai," from which the modern English word "essay" is derived, stems from the French verb "essayer," which means "to try." The French renaissance philosopher Michel de Montaigne, credited with popularizing the essay as a literary form, used his essays to test and explore his views about the world. *See* Encyclopaedia Britannica Online, Essay, http://www.search.eb.com/eb/article-9033044 (last visited Feb. 25, 2007).

12. United States v. Reynolds, 345 U.S. 1, 6 (1953); *see* United States v. Nixon, 418 U.S. 683, 710 (1974); Memorandum in Support of the Military and State Secrets Privilege; Defendants' Motion to Dismiss, *supra* note 8, at 10 (arguing that the "privilege derives from

would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."[13] The privilege can only be asserted by the head of an executive branch agency with control over state secrets, and only after that person has filed an affidavit demonstrating that he or she has personally reviewed the information at issue and determined that it qualifies as state secrets.[14]

1. *United States v. Reynolds*

The privilege was first explicitly recognized by the Supreme Court in *United States v. Reynolds*.[15] *Reynolds* involved a claim for damages against the federal government brought by the widows of three civilians killed in the crash of a B-29 aircraft. During discovery, plaintiffs sought production of the U.S. Air Force's official accident investigation reports, as well as the three surviving crew members' statements taken by the Air Force during its investigation. The United States objected, claiming both that the material was privileged under Air Force regulations and that it must be kept secret to protect national security. The Secretary of the Air Force wrote a letter to the district court explaining that "the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force."[16] The Judge Advocate General of the Air Force filed an affidavit making a formal claim of privilege and stating that the material sought by the plaintiffs could not be provided "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."[17]

The district court ordered the government to produce the documents in camera so that the court could determine whether they contained privileged material. When the government refused to do so, the court ordered that the facts on the question of negligence be found in the plaintiffs' favor, and entered final judgment for the plaintiffs. The government appealed, lost, and then brought the case to the Supreme Court.

The United States argued that the district court's decision ordering disclosure of the report constituted an "unwarranted interference with the powers of the executive," which had the constitutional authority to refuse to disclose information related to national security.[18] The plaintiffs responded that the executive's power to withhold the documents was waived by the

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the President's Article II powers to conduct foreign affairs and provide for the national defense").

13. Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

14. *Reynolds*, 345 U.S. at 7-8.

15. 345 U.S. 1. For an in-depth discussion of the *Reynolds* litigation, see Fisher, *supra* note 2, at 29-118.

16. *Id.* at 4 (internal quotation marks omitted).

17. *Id.* at 5 (internal quotation marks omitted).

18. Brief for the United States at *8, *Reynolds*, 345 U.S. 1 (No. 21), 1952 WL 82378.

Tort Claims Act, which made the government liable "in the same manner" as a private individual.[19] The Supreme Court did not adopt either of the "broad propositions" pressed upon it by the parties.[20] The Tort Claims Act expressly provides that the Federal Rules of Civil Procedure apply to suits against the United States, and because the Rules governing discovery except "privileged" material from disclosure, the Court concluded that the Tort Claims Act is not a waiver of the state secrets privilege. Nor did the Court hold that the bare assertion of the privilege by the executive would be sufficient to invoke it; rather, the "court *itself* must determine whether the circumstances are appropriate for the claim of privilege"[21] by weighing the discovery-seeking party's claim of necessity against the government's explanation of why the information would jeopardize national security.[22] Nonetheless, as recent commentators have noted, the "clear message of the *Reynolds* ruling is that courts are to show utmost deference to executive assertions of privilege."[23] And in *Reynolds* itself, the Court accepted the government's representations about the classified nature of the materials and refused to require their disclosure.[24]

The privilege affects litigation in at least three different ways. First, it can bar evidence from admission in the litigation. The plaintiff's case will then go forward without the barred evidence, and will be dismissed only if the plaintiff is unable to prove the prima facie elements of the claim without it. Second, if the privilege deprives the defendant of information that would provide a valid defense, then the court may grant summary judgment for the defendant. And third, "notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege."[25] In *Reynolds*, the Court took the first path, concluding that the privilege only limited sources of evidence and thus remanded to allow plaintiffs to take discovery and attempt to prove their case without the barred material.

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19. *Reynolds*, 345 U.S. at 530.

20. *Id.* at 6.

21. *Id.* at 8 (emphasis added).

22. *Id.* at 11.

23. Weaver & Pallitto, *supra* note 2, at 98; *see also* Fisher, *supra* note 2, at 257 ("What *Reynolds* did was to send an ominous signal that in matters of national security, the judiciary is willing to fold its tent and join the executive branch."). Professors William Weaver and Robert Pallitto note that the Supreme Court's decision to uphold the state secrets privilege in *Reynolds* relied in part on analogies to the crown privilege found in English and Scottish law. They criticize the Court for importing this privilege into U.S. law, noting that in Great Britain, "separation of powers is ill-defined and occupies a relatively less important role in the British Constitution than in that of the United States," and that *Reynolds* "fail[ed] to recognize this difference." Weaver & Pallitto, *supra* note 2, at 99.

24. The accident report was eventually declassified and, according to Professor Louis Fisher, "revealed . . . serious negligence by the government" but "contained nothing that could be called state secrets." Fisher, *supra* note 2, at xi.

25. Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998) (quoting *Reynolds*, 345 U.S. at 11 n.26).

2. The Evolution of the State Secrets Privilege

For over two decades following *Reynolds*, the executive rarely asserted the state secrets privilege, perhaps in response to the Supreme Court's admonition that the privilege "is not to be lightly invoked."[26] But starting in 1977, the executive raised the privilege with greater frequency. Between 1953 and 1976, there were only eleven reported cases addressing the privilege; between 1977 and 2001 there were fifty-nine reported cases.[27]

Scholars debate whether the Bush Administration's assertion of the state secrets privilege differs from past practice.[28] Several contend that it does, claiming that the executive is now raising the privilege with far greater frequency and is using it to obtain outright dismissals rather than simply to limit discovery.[29] A recent article by Professor Robert Chesney questions these conclusions, however, and thus is worth further discussion.

Professor Chesney reviewed all the published cases in which the executive has invoked the state secrets privilege since the *Reynolds* decision.[30] He found that the privilege was asserted two times between 1961 and 1970, fourteen times between 1971 and 1980, twenty-three times between 1981 and 1990, twenty-six times between 1991 and 2000, and

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26. *Reynolds*, 345 U.S. at 7.

27. *See* Chesney, *supra* note 2, app. Professors Weaver and Pallitto report slightly lower numbers for both those time periods. They claim that the privilege was asserted in four reported cases between 1953 and 1976, and then in fifty-one reported cases between 1977 and 2001. Weaver & Pallitto, *supra* note 2, at 101-02.

28. *Compare* Fisher, *supra* note 2, at 212, 245 (stating the privilege is being asserted with greater frequency post-9/11), *and* Weaver & Pallitto, *supra* note 2, at 109 (concluding that the executive is asserting the privilege with increasing frequency, and declaring that the "Bush administration lawyers are using the privilege with offhanded abandon"), *and* Shayana Kadidal, *The State Secrets Privilege and Executive Misconduct*, JURIST Forum, May 30, 2006, http://jurist.law.pitt.edu/forumy/2006/05/state-secrets-privilege-and-executive.php (asserting that "[p]revious invocations of the privilege by the government have most commonly been at the discovery stage, asking the courts to deny private litigants access to documents and witnesses, but more recently the government has moved to dismiss a spate of cases . . . at the pleading stage"), *with* Chesney, *supra* note 2, at 50-52 (surveying the case law and concluding that the Bush Administration's assertion of the privilege is not unprecedented in frequency, scope, or manner).

29. Fisher, *supra* note 2, at 212, 245; Weaver & Pallitto, *supra* note 2, at 109; Kadidal, *supra* note 28.

30. Chesney, *supra* note 2, app. As Professor Robert Chesney is careful to note, using published decisions as the basis for determining the frequency of a particular administration's assertion of the privilege is problematic. *Id.* at 52-54. The executive's claims may often be decided in unpublished rulings that are not available for analysis. Furthermore, cases decided during one administration might have arisen out of the assertion of the privilege by a previous administration. And in any event the frequency of the privilege's assertion might have more to do with the number of cases challenging executive branch activity than a particular administration's policy regarding use of the privilege. Despite these limitations, Professor Chesney analyzes these cases because they provide the only data on the privilege, and because even with the aforementioned limitations they help to guide discussion of patterns in executive assertion of the privilege. *Id.*

twenty times between 2001 and 2006.[31] He concluded that these numbers "do[] not support the conclusion that the Bush Administration employs the privilege with greater frequency than prior administrations."[32]

Professor Chesney also addressed the claim that the Bush Administration is asserting the privilege in a qualitatively different manner than in the past. Some commentators contend that the privilege was once used primarily to restrict discovery, but is now being invoked as grounds for dismissal of entire lawsuits.[33] Professor Chesney's analysis of the published cases reveals that the executive sought outright dismissal based on the privilege in five cases between 1971 and 1980, nine cases between 1981 and 1990, thirteen cases between 1991 and 2000, and fifteen cases between 2001 and 2006.[34] Again, Professor Chesney determined that the data demonstrates that the Bush Administration's use of the privilege is not unprecedented.[35]

Professor Chesney's careful analysis of the case law has provided valuable data with which to analyze claims about the state secrets privilege. I disagree, however, with his conclusion that these numbers prove that the Bush Administration's assertion of the privilege does not differ from that of previous administrations. First, Professor Chesney's survey demonstrates that from 2001 through 2006 both the number of invocations of the privilege and the occasions on which the Administration sought to dismiss a case in its entirety increased significantly. The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade.

The sample size is small, and it is hard to draw conclusions from published decisions alone, for all the reasons noted by Professor Chesney.[36] But to the degree that the published cases provide any insight into the policy of this Administration, they are consistent with the conclusion that it has raised the privilege with greater frequency than ever before, and has more often sought to remove cases entirely from judicial dockets.

Second, and of greater significance, the Bush Administration's recent assertion of the privilege differs from past practice in that it is seeking blanket dismissal of every case challenging the constitutionality of specific, ongoing government programs. In comparison, the government responded

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31. *See id.* In addition, the government informed the court in *Conner v. AT&T* that it "intends to assert the military and state secrets privilege in all of the[] actions" pending against the telephone company that allegedly provided the United States access to telephone communications without a warrant, and would "seek their dismissal." No. CV F 06-0632, 2006 WL 1817094, at *2 (E.D. Cal. June 30, 2006),

32. *See* Chesney, *supra* note 2, at 52.

33. *See* Kadidal, *supra* note 28.

34. As discussed in *supra* note 31, the government has stated that it will seek dismissal on state secrets grounds of all the pending challenges to the NSA's warrantless wiretapping program. Because there have not been published decisions on that issue in most of these cases, they are not included in Professor Chesney's analysis.

35. *See* Chesney, *supra* note 2, at 52.

36. *See supra* note 30.

to lawsuits brought in the 1970s and 1980s challenging its warrantless surveillance programs by seeking to limit discovery, and only rarely filed motions to dismiss the entire litigation.[37] The current practice is thus unique.

I hasten to add, however, that the blanket assertion of the privilege should not be viewed as concrete evidence of the current Administration's overzealous use of the privilege; one would expect all cases challenging a specific government program to raise the same privilege issues. It is fair to say, nevertheless, that this Administration's invocation of the state secrets privilege as grounds for dismissal of all cases challenging the NSA's practice of warrantless wiretapping and the extraordinary rendition program raises new concerns for the courts.

3. *Totten v. United States*

Although *Reynolds* marked the first explicit recognition of the state secrets privilege by the Supreme Court, the privilege has roots in the Court's 1875 decision in *Totten v. United States*.[38] Because the Bush Administration relies on *Totten*, as well as *Reynolds*, to support dismissal of cases challenging its conduct, the case is summarized below.

Totten involved a contract dispute between a Union spy and President Abraham Lincoln. The contract, which the parties entered into in July 1861, provided that the spy was to travel behind "rebel lines" and transmit information about the Confederate Army to the President in return for payment of $200 per month. The spy performed the tasks agreed upon, but was reimbursed only for his expenses.

The Supreme Court concluded that although President Lincoln had the authority to enter into the contract, no court could enforce it. The Court explained that it could not permit a suit against the government to proceed in which "the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public."[39] The Court then stated, "[A]s a general principle . . . public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[40] Accordingly, the Court dismissed the case.

The *Totten* bar was recently reaffirmed by the Supreme Court in *Tenet v. Doe*,[41] a case in which two former spies claimed that the government had reneged on its agreement to provide lifetime support for them in the United States in return for espionage services in their native country. Their

37. *See* Chesney, *supra* note 2, app.

38. 92 U.S. 105 (1875); *see* United States v. Reynolds, 345 U.S. 1, 7 n.11 (1953) (citing *Totten*, 92 U.S. at 107).

39. *Totten*, 92 U.S. at 106-07.

40. *Id.* at 107.

41. 544 U.S. 1 (2005).

complaint alleged that the government had violated their equal protection and due process rights by refusing to abide by the terms of their original agreement. The district court denied the government's motion to dismiss pursuant to *Totten* on the ground that *Totten* applied solely to breach of contract claims,[42] and the Ninth Circuit affirmed.[43] The Supreme Court reversed, holding that the *Totten* bar precludes judicial review of any claim based on a covert agreement to engage in espionage for the United States.[44]

B. *The State Secrets Privilege Post-September 11*

In response to the events of September 11, 2001, the executive began taking new steps to combat terrorism. The media has recently reported on two controversial executive practices that have subsequently been challenged in court: the extraordinary rendition program, under which the United States transfers foreigners suspected of having ties to terrorist organizations to foreign countries that practice torture;[45] and the NSA's warrantless wiretapping program, under which the NSA eavesdropped on telephone conversations involving suspected terrorists without first obtaining a warrant.[46]

Lawsuits have been filed challenging the constitutionality of both programs by plaintiffs seeking damages and injunctive relief. In response, the executive has invoked the state secrets privilege, not just as grounds for dismissing some claims, but as a basis for having all litigation challenging these two programs dismissed with prejudice prior to discovery. As of December 31, 2006, six district courts have issued decisions in these categories of cases and have split on the question whether to dismiss on state secrets grounds.[47] The cases appear fast-tracked for appeal to the federal courts of appeals and may end up before the Supreme Court.

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42. *See* Doe v. Tenet, No. C99-1597L, 2001 WL 35925897 (W.D. Wash. Jan. 22, 2001).

43. *See* Doe v. Tenet, 329 F.3d 1135 (9th Cir. 2003).

44. *See Tenet*, 544 U.S. at 3.

45. Nina Bernstein, *U.S. Defends Detention at Airports*, N.Y. Times, Aug. 10, 2005, at B1; Don Van Natta, Jr., *Germany Weighs if it Played Role in Seizure by U.S.*, N.Y. Times, Feb. 21, 2006, at A1.

46. James Risen & Erich Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1. On January 17, 2007, the Bush Administration announced that it would submit its domestic surveillance program to supervision by the Foreign Intelligence Surveillance Court. *See* Adam Liptak, *The White House as a Moving Legal Target*, N.Y. Times, Jan. 19, 2007, at A1. The effect of this change in conduct on the pending cases is unclear. The Administration has argued that these cases are now moot, but plaintiffs contend that the executive's voluntary cessation of the challenged conduct does not moot their litigation. *See* Adam Liptak, *Judges Weigh Arguments in U.S. Eavesdropping Case*, N.Y. Times, Feb. 1, 2007, at A11 (describing the arguments by the government and the ACLU before the U.S. Court of Appeals for the Sixth Circuit in the government's appeal from the district court's decision in *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006)).

47. *See* Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215 (D. Or. 2006) (rejecting the government's claim that the challenge to the NSA's warrantless wiretapping program should be dismissed on state secrets grounds); Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006) (dismissing a challenge to the NSA's warrantless wiretapping program on state secrets grounds); Hepting v. AT&T, Corp., 439 F. Supp. 2d 974 (N.D. Cal.

This Essay will not recount in detail all the recent litigation in this area because the government makes almost identical arguments regarding the need for dismissal in each of the extraordinary rendition and NSA warrantless wiretapping cases. Summarized below are a few cases in each category to give the reader a sense of the underlying controversy, the positions taken by the United States and the litigants, and the courts' responses.

1. Challenges to the Extraordinary Rendition Program

a. El-Masri v. Tenet[48]

Khaled El-Masri, a German citizen of Lebanese descent, asserted that on New Year's Eve 2003 he was seized by Macedonian authorities while crossing the border between Serbia and Macedonia. El-Masri alleges that he was imprisoned in a Skopje hotel for twenty-three days, where he was repeatedly questioned about his associations with al Queda by U.S. officials. Despite his denials of any involvement with al Queda, El-Masri contends that the U.S. government then flew him to Kabul, Afghanistan, where he remained until May 28, 2004, when he was taken to an abandoned road in Albania and released.

El-Masri filed a lawsuit in the U.S. District Court for the Eastern District of Virginia alleging that he was transported against his will to Afghanistan as part of the United States' "extraordinary rendition" program, and that he was repeatedly interrogated, drugged, and tortured throughout his ordeal. He named as defendants the former Director of the Central Intelligence Agency (CIA), George Tenet; private corporations allegedly involved in the program; and unknown employees of the CIA and private corporations who participated in his alleged abduction and torture. El-Masri asserted three causes of action. First, he brought a *Bivens* claim against Tenet and unknown CIA agents for violations of his Fifth Amendment right not to be deprived of his liberty without due process and not to be subject to treatment that "shocks the conscience."[49] Second, he brought a claim pursuant to the Alien Tort Statute for violations of international legal norms prohibiting prolonged, arbitrary detention. Third, he brought a claim pursuant to the Alien Tort Statute for each defendant's violation of international legal norms prohibiting cruel, inhuman, and degrading treatment.

2006) (rejecting the government's claim that the challenge to the NSA's warrantless wiretapping program should be dismissed on state secrets grounds); *ACLU*, 438 F. Supp. 2d 754 (same); El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (dismissing legal claims arising from extraordinary rendition on state secrets grounds); *see also* Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissing legal claims arising from extraordinary rendition without reaching the government's state secrets claim).

48. 437 F. Supp. 2d 530 (E.D. Va. 2006).

49. *Id.* at 534-35.

On March 8, 2006, the United States filed a formal claim of state secrets privilege, supported by an unclassified and a classified (and ex parte) declaration by the Director of the CIA. Five days later, the United States filed a motion to intervene to protect its interests in preserving state secrets, and a motion to dismiss or for summary judgment on the ground that maintenance of the suit would inevitably require disclosure of state secrets.[50] The government asserted that "the plaintiff's claim in this case plainly seeks to place at issue alleged clandestine foreign intelligence activity that may neither be confirmed nor denied in the broader national interest," but could not give more details about the potential damage because "even stating precisely the harm that may result from further proceedings in this case is contrary to the national interest."[51] In addition to seeking dismissal on state secret grounds, the executive argued that the case should be dismissed pursuant to the *Totten* bar.

U.S. District Judge T. S. Ellis granted the government's motion to dismiss. Judge Ellis commented that the state secrets privilege is of "the highest dignity and significance" in light of the "vitally important purposes" it serves.[52] Although Judge Ellis noted that the "courts must not blindly accept the Executive Branch's assertion [of the privilege], but must instead independently and carefully determine whether, in the circumstances, the claimed secrets deserve the protection of the privilege," he qualified this statement by commenting that "courts must also bear in mind the Executive Branch's preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national security."[53] He also wrote that the privilege is absolute—that is, once a court determined that the privilege had been validly asserted, it applies no matter how great the opposing interests at stake.

Judge Ellis then concluded that the privilege applied to the information sought by El-Masri. The Director of the CIA's unclassified declaration spoke in general terms about the harm to national security that might result were the government forced to admit or deny El-Masri's allegations. Although the Judge could not reveal the contents of the ex parte declaration, he stated that "any admission or denial of [El-Masri's] allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security."[54] Despite the government's public admission that the extraordinary rendition program exists, Judge Ellis concluded that this general information did not render the details of

50. Memorandum of Points and Authorities in Support of the Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment at 11, *El-Masri*, 437 F. Supp. 2d 530 (No. 01417).

51. *Id.* at 11-12.

52. *El-Masri*, 437 F. Supp. 2d at 536.

53. *Id.*

54. *Id.*

the program as it may have been applied to El-Masri less worthy of being kept classified.

Finally, Judge Ellis dismissed the case after concluding that the privileged material is "central" to the claims and defenses raised in the litigation.[55] He explained that although

> "dismissal is appropriate only when no amount of effort and care on the part of the court and the parties will safeguard privileged material," it is equally well-settled that "where the very question on which the case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the appropriate remedy."[56]

El-Masri's lawsuit must be dismissed, the Judge explained, because any response to his claims of abduction, detention, and torture as part of the United States' extraordinary rendition program would inevitably reveal "specific details" about that program.[57] Moreover, Judge Ellis concluded that protective procedures, such as providing defense counsel with clearance to review classified documents, would be "plainly ineffective" because the "entire aim of the suit is to prove the existence of state secrets."[58] Accordingly, "El-Masri's private interests must give way to the national interest in preserving state secrets."[59]

In a concluding paragraph, Judge Ellis took pains to emphasize that "reasonable and patriotic Americans are still free to disagree about the propriety and efficacy of [the extraordinary rendition program]"—it is just that they may not be able to bring such claims before a court.[60] The district court also noted that if El-Masri's claims were true, then El-Masri "deserves a remedy."[61] The "sources of that remedy," however, "must be the Executive Branch or the Legislative Branch, not the Judicial Branch."[62]

On July 25, 2006, El-Masri's lawyers announced that they had filed an appeal to the U.S. Court of Appeals for the Fourth Circuit.[63]

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55. *Id.* at 538.
56. *Id.* (quoting Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005)).
57. *Id.*
58. *Id.* at 539.
59. *Id.* The district court did not address the United States' alternative argument that the case was nonjusticiable pursuant to the "*Totten* bar." *Id.* at 540.
60. *Id.* at 540.
61. *Id.* at 541.
62. *Id.*
63. *See* Press Release, ACLU, ACLU Appeals Case of German Man Kidnapped by CIA (July 25, 2006), *available at* http://www.aclu.org/safefree/extraordinaryrendition/26219prs20060725.html.

b. Arar v. Ashcroft[64]

Maher Arar's claims parallel those raised by Khaled El-Masri. Like El-Masri, Arar alleges that he was abducted, detained, and then sent to another country where he was tortured as part of the United States' extraordinary rendition program. Arar, a Syrian-born Canadian citizen, was employed as a software engineer in Massachusetts. In September 2002, Arar alleged that he was detained by U.S. authorities at John F. Kennedy International Airport in New York City while flying back from Switzerland, and that he was kept in solitary confinement there for thirteen days. On October 1, 2002, Arar was told by government officials that he could not be admitted back into the United States because they believed that he was a member of al Queda. Although Arar was assured that he would not be sent back to his native Syria, nine days later he alleged that he was flown by private jet to Amman, Jordan, where federal officials delivered him to Jordanian officials, who in turn brought him to Syria. In Syria, Arar contends that he was imprisoned for a year in a small jail cell where he was beaten and tortured by Syrian security forces. He claims that his Syrian interrogators worked with U.S. officials, who provided information and questions and received reports from the Syrians about Arar's responses. Arar was released on October 5, 2003. No charges were ever filed against him.

Arar filed suit in the Eastern District of New York claiming that his removal from the United States violated his Fifth Amendment rights, as well as the Torture Victims Protection Act and other treaties.

Prior to discovery, the government moved for dismissal or summary judgment on state secrets grounds of the three claims concerning the U.S. government's deportation of Arar to Syria and his interrogation and torture while there.[65] The executive's arguments were similar to those made in El-Masri's case: The very subject matter of the case concerned the details of a program that was secret, and needed to be kept that way for national security reasons. The government's reasons for detaining Arar, concluding that he was a member of al Queda, and then sending him to Syria rather than to Canada cannot be disclosed, the government argued, without jeopardizing national security. Because information at the "core" of Arar's first three claims is a state secret, the government concluded that these claims must be dismissed.

The district court issued a decision on February 16, 2006, dismissing all of Arar's claims. The court held that Arar lacked standing to bring claims for declaratory relief against the plaintiffs in their official capacities; that the Torture Victim Protection Act does not provide him with a cause of action; and that he could not bring a *Bivens* action "given the national-

64. 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

65. The government did not seek dismissal of Maher Arar's fourth claim on state secrets grounds. That claim concerned his alleged mistreatment while detained in the United States. The United States and the individual defendants sought to dismiss that claim on other grounds.

security and foreign policy considerations at stake."[66] Because the court dismissed Arar's claims on other grounds, it did not address the executive's claim that the case should also be dismissed on state secrets grounds.[67] Arar's lawyers have filed an appeal to the Second Circuit.

2. Challenges to the NSA's Warrantless Wiretapping Program

a. Hepting v. AT&T Corp.[68]

In *Hepting v. AT&T Corp.*, filed in the Northern District of California, plaintiffs alleged that AT&T is collaborating with the NSA to conduct a warrantless surveillance program that illegally eavesdrops on the communications of millions of Americans. The existence of the program was publicly acknowledged by the President in December 2005 after an article describing the warrantless wiretapping appeared in *The New York Times*. As the President explained at a press conference on December 19, he authorized the NSA to intercept communications for which there were "reasonable grounds to believe that (1) the communication originated or terminated outside the United States, and (2) a party to such communication is a member of al Qaeda, a member of a group affiliated with al Qaeda, or an agent of al Qaeda or its affiliates."[69] The complaint contends that AT&T, acting as an agent of the U.S. government, has violated the First and Fourth Amendment rights of U.S. citizens, as well as the Foreign Intelligence Surveillance Act (FISA) and various other state and federal laws. The plaintiffs seek certification of a class action and damages, restitution, disgorgement, and injunctive and declaratory relief.[70]

On May 13, 2006, the United States sought to intervene and moved for dismissal or summary judgment on the basis of the state secrets privilege.[71] Its assertion of the privilege was supported by public declarations from John Negroponte, Director of National Intelligence, and Keith Alexander, Director of the NSA. The government also invited the court to review classified information supporting the privilege in camera and ex parte, which the court eventually did.[72]

The government argued that the case should be dismissed on the basis of the state secrets privilege for three reasons: first, because the "very subject matter of [the action]" concerns privileged information; second, because the

66. *Arar*, 414 F. Supp. 2d at 287.
67. *Id.*
68. 439 F. Supp. 2d 974 (N.D. Cal. 2006).
69. United States' Reply in Support of the Assertion of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment By the United States at 1, *Hepting*, 439 F. Supp. 2d 974 (No. 0672), 2006 WL 2038464 (citing Press Release, Press Conference of the President (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html).
70. *Hepting*, 439 F. Supp. 2d at 979.
71. *Id.*
72. *Id.*

plaintiffs could not make their prima facie case without the privileged information; and third, because the absence of the privileged information would deprive AT&T of a defense.[73] In addition, because the case concerned a covert agreement between AT&T and the government, the United States contended that it qualified for dismissal under *Totten v. United States.*

District Court Judge Vaughn Walker denied the government's motion on July 20, 2006. The court began by describing the information publicly available about the NSA terrorist surveillance program. Judge Walker noted that the NSA surveillance program had been reported in the press and confirmed by President Bush. When questioned about its involvement in the program, AT&T had refused to confirm or deny existence of the program, but stated that "when the government asks for our help in protecting national security, and the request is within the law, we will provide that assistance."[74] Based on this information, the court concluded that AT&T's involvement in the program was not covert, but rather was public information, and thus the case should not be dismissed under the *Totten* bar.[75]

Turning to the state secrets privilege, the court noted as a threshold matter that "no case dismissed because its 'very subject matter' was a state secret involved ongoing, widespread violations of individual constitutional rights," as were alleged here, but instead most cases concerned "classified details about either a highly technical invention or a covert espionage relationship."[76] In addition, the court stated that the "very subject matter of this action is hardly a secret" because "public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program."[77] For this reason, Judge Walker concluded that the case was distinguishable from *El-Masri v. Tenet,* where the entire purpose of the lawsuit was to reveal classified details regarding the extraordinary rendition program.[78]

Judge Walker declared that it was "premature" to decide whether the case should be dismissed on the ground that the plaintiffs could not make out a prima facie case or AT&T could not assert a valid defense.[79] Instead, Judge Walker determined that he should let discovery proceed and then assess whether any information withheld pursuant to the state secrets privilege would require the suit's dismissal.

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73. *Id.* at 985.
74. *Id.* at 992.
75. *Id.* at 993 ("In sum, the government has disclosed the general contours of the 'terrorist surveillance program,' which requires the assistance of a telecommunications provider, and AT&T claims that it lawfully and dutifully assists the government in classified matters when asked.").
76. *Id.*
77. *Id.* at 994.
78. *Id.*
79. *Id.*

In conclusion, Judge Walker commented that he viewed the state secrets privilege as limited, at least in part, by the role of the court in the constitutional structure:

> [I]t is important to note that even the state secrets privilege has its limits. While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it. . . . To defer to a blanket assertion of secrecy here would be to abdicate that duty. . . .[80]

Judge Walker certified his denial of the government's motion to dismiss for interlocutory appeal because "the state secrets issues resolved herein represent controlling questions of law as to which there is a substantial ground for difference of opinion."[81] The government immediately petitioned the Ninth Circuit for interlocutory review.[82]

b. American Civil Liberties Union v. National Security Agency[83]

In *ACLU v. NSA*, a group of journalists, academics, attorneys, and nonprofit organizations challenge the same warrantless surveillance program at issue in *Hepting*. The plaintiffs communicate with individuals from the Middle East whom the government might suspect of being affiliated with al Queda, and thus they believe that their telephone calls and internet communications would fall within the scope of the NSA's warrantless wiretapping program. They contend that even the possibility that the government is eavesdropping on their calls has a chilling effect on their communications and thus disrupts their ability to talk to clients, sources, witnesses, and generally engage in advocacy and scholarship.[84] The plaintiffs brought suit in federal court in the Eastern District of Michigan challenging the surveillance program as a violation of the separation of powers doctrine, their First and Fourth Amendment rights, and FISA and other federal laws. They sought declaratory and injunctive relief that would prevent the NSA from eavesdropping on domestic communication without a warrant.

The United States filed a motion to dismiss or for summary judgment very similar to that filed in *Hepting*. Although the executive conceded that the "issues before the Court" regarding the constitutionality of the NSA's surveillance program "are obviously significant and of considerable public interest,"[85] it contended that these questions cannot be explored in litigation

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80. *Id.* at 995 (citations omitted).

81. *Id.* at 1011.

82. Petition by Intervenor United States for Interlocutory Appeal Under 28 U.S.C. 1292(b), *Hepting*, 439 F. Supp. 2d 974 (No. 672).

83. ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

84. Complaint at 2, ACLU, 438 F. Supp. 2d (No. 10204).

85. Memorandum in Support of the Military and State Secrets Privilege, *supra* note 8, at 1.

because the evidence supporting the government's program qualifies for the state secrets privilege, as well as specific statutory privileges.[86] In a public and in camera declaration submitted by John Negroponte, Director of National Intelligence, and a public and in camera declaration of Major General Richard J. Quirk, Signals Intelligence Director, National Security Agency, the executive formally asserted the state secrets privilege to prevent disclosure of "intelligence activities, information, sources, and methods" relevant to the litigation.[87] Without this evidence, the executive claimed that plaintiffs could neither establish standing to sue nor prove the merits of their claims. Because the "very subject matter" of the lawsuit is a state secret, the executive asserted that the litigation must be dismissed, or alternatively, the court should grant the defendants' motion for summary judgment.[88]

The plaintiffs responded that statements already in the public record acknowledging the existence of the NSA's surveillance program were sufficient to determine their standing and the lawfulness of the program. The government, however, strongly disagreed: "[T]o decide this case on the scant record offered by Plaintiffs, and to consider the extraordinary measure of enjoining the intelligence tools authorized by the President to detect a foreign terrorist threat on that record, would be profoundly inappropriate."[89] The government argued that the President's exercise of his "core Article II and statutory powers to protect the Nation from attack" cannot be resolved on the basis of the public record alone.[90]

On August 17, 2006, U.S. District Judge Anna Diggs Taylor issued an opinion rejecting the government's claim that the case should be dismissed on state secrets ground, and finding the NSA's warrantless wiretapping program to be unconstitutional.[91] The government's attempt to have the case dismissed prior to discovery suggested to Judge Taylor that the government was arguing that the case was not justiciable under the *Totten* doctrine. Judge Taylor concluded, however, that the *Totten* bar was not applicable because the case did not concern an "espionage relationship between the Plaintiff and the Government," as had been the case in *Totten* and in the most recent application of that doctrine in *Tenet v. Doe*.[92]

Following the lead of Judge Walker, Judge Taylor reviewed the aspects of the NSA's warrantless wiretapping program that had been publicly admitted by the Administration, and the defense of that program that the Administration had articulated thus far. She concluded that the plaintiffs' challenge to the program could be resolved based on the government's on-the-record statements, and that neither the plaintiffs nor the government

86. *Id.*
87. *Id.* at 4.
88. *Id.* at 5 (quoting United States v. Reynolds, 345 U.S. 1, 11 n.26 (1952)).
89. *Id.* at 3.
90. *Id.*
91. ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).
92. *Id.* at 763.

needed to discuss details of the program to pursue the litigation. For those reasons, Judge Taylor denied the government's motion to dismiss or for summary judgment, and went on to address the merits of the constitutional and statutory challenges to the NSA warrantless wiretapping program.

The government has filed a notice of appeal to the Sixth Circuit.

c. *Pretrial Consolidation of Challenges to NSA Warrantless Wiretapping*

As of August 2006, several dozen lawsuits have been filed challenging the NSA's practice of wiretapping without first obtaining warrants. On August 9, 2006, the Judicial Panel on Multidistrict Litigation ordered that seventeen of the most closely-related cases be consolidated for pretrial motions before Judge Walker, who had already ruled in *Hepting* that the state secrets privilege does not apply.[93] The panel concluded that the Northern District of California is the "appropriate transferee forum" because it is the district "where the first filed and significantly more advanced action is pending before a judge already well versed in the issues presented by the litigation."[94] It rejected the government's request to have the cases transferred to the District of Columbia because that would require "the very duplication and expansion of access to classified information that the Government deems to be so perilous."[95]

As a result of this consolidation, the state secrets privilege issue should be resolved quickly in those seventeen cases, and that decision will likely be followed by immediate appeal to the Ninth Circuit and possibly the U.S. Supreme Court.

II. CONGRESSIONAL CONFERRAL OF JURISDICTION AS A MEANS OF EXECUTIVE OVERSIGHT

As described in the previous section, the Bush Administration has asserted the state secrets privilege to seek immediate dismissal of all cases challenging the constitutionality of two specific government programs. Commentators dispute whether the Bush Administration is raising the privilege with greater frequency than before, and whether its use of the privilege to obtain dismissals rather than discovery relief differs from past practice.[96] What is undebatable, however, is that the privilege is currently being invoked as grounds for dismissal of entire categories of cases challenging the constitutionality of government action. The executive's concurrent claim that these cases are nonjusticiable under the *Totten* bar is further evidence that, as one commentator put it, "the administration is now well on its way to transforming [the state secrets privilege] from a narrow

93. *In re* NSA Telecomm. Records Litig., 444 F. Supp. 2d 1332 (J.P.M.L. 2006). The court stated in a footnote that twenty-six potentially related actions would be "treated as potential tag-along actions in accordance with Panel and local court rules." *Id.* at 1334 n.1.

94. *Id.* at 1335.

95. *Id.*

96. *See supra* notes 27-31 and accompanying text.

evidentiary privilege into something that looks like a doctrine of broad government immunity."[97]

Conceptualizing the state secrets privilege as an attempt to deprive courts of subject matter jurisdiction over cases challenging the constitutionality of certain executive practices raises new concerns—concerns that differ from those articulated by the litigants. The plaintiffs in these cases have warned that dismissal will prevent injured parties from vindicating their constitutional rights, and will strip the courts of their authority to remedy such violations in individual cases. These objections are certainly valid, and have been cited by some courts as reasons to avoid using the privilege as a basis for dismissal prediscovery.[98] Absent thus far is a discussion of whether dismissals on state secrets grounds diminishes the power of Congress in our constitutional structure, perhaps because concern for Congress's authority only becomes clear when the privilege is recognized as equivalent to an executive attempt to narrow federal jurisdiction.

A. *First Principles: Congressional Control over Federal Jurisdiction as a Means of Executive Oversight*

1. Congressional Control over Federal Jurisdiction

Congress exercises near plenary control over the jurisdiction of the federal courts. Granted, Congress must do so within constitutional confines: Congress can only assign to federal courts cases falling under the nine subject matter headings in Section 2 of Article III, and there are some limits on Congress's ability to strip all federal courts of jurisdiction to hear certain kinds of constitutional claims.[99] But within these parameters Congress has sweeping authority to craft federal jurisdiction through legislation.[100]

Congress's authority over federal jurisdiction arises logically from its control over the very existence of the lower federal courts. The framers

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97. Henry Lanman, *Secret Guarding*, Slate, May 22, 2006, http://www.slate.com/id/2142155/.

98. *See supra* Part I.

99. *See, e.g.*, Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499 (1990); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569 (1990); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. Pa. L. Rev. 1633 (1990); Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts,"* 78 Tex. L. Rev. 1405 (2000).

100. *See* Ankenbrandt v. Richards, 504 U.S. 689, 698 (1992) ("'[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 244 (1845))).

disagreed over the need for the "inferior" courts. Under a compromise negotiated by James Madison, they agreed to give Congress the choice whether to create lower federal courts, and, as part and parcel of that compromise, the authority to decide which cases those courts could hear. Thus, every time a lower federal court hears a case, it does so at Congress's pleasure.[101]

The existence of the Supreme Court, unlike the lower federal courts, is constitutionally mandated, but Congress retains a great deal of control over the jurisdiction of the nation's highest court as well. Article III provides that the "Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Although Congress's power to strip the Supreme Court of jurisdiction is also not absolute,[102] Congress has significant latitude to shape Supreme Court jurisdiction in the course of crafting "exceptions" to the Court's appellate jurisdiction.[103]

2. Legislative and Judicial Collaboration in Executive Oversight

Congress's extensive control over federal jurisdiction has important ramifications. First, it bolsters the democratic legitimacy of judicial decision making. Because courts are counter-majoritarian institutions, their decisions are in some tension with a democratic system of government. Indeed, the federal courts are insulated from politics precisely so that they can serve as a check on the tyranny of the majority. Nonetheless, our constitutional structure provides the judiciary with second-order democratic legitimacy by giving the political branches the power not just to select and impeach judges, but also to determine which cases they will hear. When an unelected federal judge issues a decision that affects thousands or millions of Americans, his authority to do so comes in part from the grant of jurisdiction bestowed by elected members of Congress.[104]

Second, Congress's power to confer jurisdiction permits Congress to work together with courts to police the activities of the executive branch. Once Congress passes a statute it is then the duty of the executive branch to "faithfully execute" the law.[105] Although Congress has no formal role in implementing statutes, it has several indirect methods of checking the executive's performance of that function. For example, Congress can

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101. *See* Erwin Chemerinsky, Federal Jurisdiction § 3.3 (4th ed. 2003).

102. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); *see also* Chemerinsky, *supra* note 98, § 3.2.

103. *See* Chemerinsky, *supra* note 101, § 3.2.

104. *See, e.g.*, David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 Geo. L.J. 2481, 2508 (1998) ("Congress's power to control the jurisdiction of federal courts finds solid support in the text of the Constitution, and plays an important structural role in legitimating the courts' antidemocratic decisions: the very fact that Congress could limit the federal courts' jurisdiction, but has not, affords the courts' decisions a degree of political legitimacy.").

105. U.S. Const. art. II, § 1.

reduce or increase funding for the executive's favored programs, and it can hold oversight hearings at which executive branch officials must explain themselves. In addition, Congress can grant federal courts jurisdiction to hear cases challenging the executive's implementation of the law, or claiming that executive action exceeds statutory or constitutional limits. This last method of executive oversight differs from the others in that Congress is not acting on its own, but rather is delegating executive oversight to the judicial branch.[106]

Congress has good reasons to utilize the courts to assist it in overseeing the executive branch. Allowing courts to hear such cases keeps Congress and the executive from clashing directly. A lawsuit challenging executive action will be brought by a private citizen, and the decision will be made by a court and not Congress. Furthermore, because courts are somewhat insulated from political pressures, judicial decisions regarding the constitutionality of executive action may be more acceptable to a public suspicious of the President's or Congress's motives—particularly when the executive and legislative branches are controlled by opposing parties. Courts also have the advantage of hearing challenges to executive conduct in the context of a concrete injury suffered by the plaintiff, whereas Congress's inquiries may be more abstract and general. The judicial process, with its many fact-finding mechanisms and opportunities to be heard, is perhaps the better way to resolve some of these debates. Finally, members of Congress are burdened with many responsibilities—the primary one being to enact legislation—and thus they do not have the time to devote to executive oversight. By creating federal jurisdiction over cases challenging executive action, Congress has enlisted approximately 900 federal judges to assist it in this task.[107]

The ability of two branches to coordinate oversight of the third is an often overlooked aspect of our tripartite system of government, and yet it serves an important role in the system of checks and balances established by the Constitution. The formalist view of separation of powers requires that each branch perform its assigned tasks with rigid independence from

106. Theoretically, Congress could provide for resolution of cases challenging executive conduct in state courts alone. Many of the same observations stated here would continue to apply were Congress to select the state rather than federal judiciary to be its partner in federal oversight. However, there are some limits on state courts' authority to compel federal officials to take action. *See* McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821) (holding that a state court lacked the power to issue a mandamus to a federal executive official); Tarble's Case, 80 U.S. (13 Wall.) 397 (1872) (holding that a state court lacked power to issue a writ of habeas corpus for a federal prisoner). These restrictions suggest that Congress has conferred broad federal question jurisdiction on federal courts (and provided for removal of federal question cases from state to federal courts) because federal courts are the more appropriate and able partner to curb executive overreaching. *See* 28 U.S.C §§ 1441, 1442 (2000).

107. *See* Weaver & Pallitto, *supra* note 2, at 102 ("In recognition of its limited capacities of oversight, Congress facilitates executive accountability by transferring much of its oversight function to the judiciary.").

the others.[108] The dominant functionalist theory is more flexible, conceding that the branches may engage in activities outside of their narrow, constitutionally assigned tasks, but only so long as they do not diminish the constitutional stature of another branch by taking over its essential functions.[109] The latter view, in the words of Justice Jackson in the *Steel Seizure* case, "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[110] When Congress drafts the courts to assist in executive oversight, it is drawing upon the flexibility of the constitutional structure to keep the executive in line.

B. *Applying First Principles to the Executive's Assertion of the State Secrets Privilege*

1. Judicial Discretion to Exercise Jurisdiction

The litigants and courts addressing the state secrets privilege have viewed it as an evidentiary restriction, and not as the executive's attempt to carve out a set of cases from the jurisdiction conferred on the courts by Congress. Yet the executive is using the privilege to seek dismissal of every case challenging the constitutionality of the extraordinary rendition and warrantless wiretapping programs. The end result is the same as if the executive branch told the courts that cases challenging the constitutionality of this set of executive actions are beyond the judiciary's power to hear and decide.

The executive's assertion of the privilege thus undermines Congress's authority to assign federal jurisdiction and simultaneously to enlist the courts as its partner in executive oversight. When a litigant claims that the executive has violated a statute or engaged in unconstitutional conduct—as is alleged in the challenges to both the warrantless wiretapping and extraordinary rendition programs—courts serve as a check on the potential abuse of executive authority. They do so because Congress gave the federal judiciary the authority to hear cases in which executive power is challenged by enacting 28 U.S.C. § 1331, which grants courts broad federal question

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108. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1530 (1991).

109. *See id.* at 1530 (describing "the scholarly debate about separated powers" as "polarized, for the most part, between the formalists and the functionalists—a battle between those who would pay the price of rigidity in order to achieve an elusive determinacy on the one hand, and those who would pay the price of indeterminacy in order to achieve unguided flexibility on the other").

110. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also* The Federalist No. 51, at 337 (James Madison) (Edward Mead Earle ed., 1937). The framers sought to prevent any one branch from aggrandizing power by "so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." *Id.*

jurisdiction, and by enacting specific statutory limits on executive power in the area of national security, such as in the Foreign Intelligence Surveillance Act. If the judiciary agrees with the executive branch that it must dismiss these cases to protect state secrets, it is abdicating its congressionally assigned task to restrain executive power.

For this reason, the executive's assertion of the state secrets privilege in the cases outlined in Part I cannot be equated with the use of the privilege in either *Reynolds* or *Totten*. In the latter two cases, the plaintiffs were seeking damages for negligence and breach of contract, respectively; they made no claims that the executive had overstepped its constitutional authority. Although the *Totten* bar was recently affirmed in *Tenet v. Doe*, in which the plaintiffs did allege that their constitutional rights were violated by the government's failure to adhere to the terms of their contract, *Tenet* did not involve any ongoing executive branch program or practice and the dispute was limited to the parties before the Court. The executive's assertion of the privilege in all of these cases was not part of a broad pattern under which it raised the privilege to bar any case of this type from being heard in court. Certainly, *Reynolds*, *Totten*, and *Tenet* all involved legal claims that Congress had granted federal courts jurisdiction to hear and decide. But the judicial role in these cases was to determine whether an individual deserved a remedy, and not to act as Congress's deputy in curbing ongoing abuse of executive power.

In its post-9/11 assertions of the state secrets privilege, the executive branch acknowledges that it is seeking to eliminate judicial oversight of some executive programs, but contends that the legality of executive action is better addressed by the "political branches" and not the courts.[111] That argument overlooks the primary role that Congress—one of the "political branches"—plays in granting federal courts jurisdiction in the first instance. Indeed, for the reasons described above, the "political branch" solution to the problem might well be to permit courts to determine the legality of such executive conduct.

Admittedly, Congress's decision to grant federal courts jurisdiction over cases challenging executive authority does not require courts to ignore executive claims of privilege and hear cases that jeopardize national security. Congress provides federal jurisdiction over large categories of cases, such as 28 U.S.C. § 1331's broad grant of jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States." When faced with a specific case that would force disclosure of information vital to national security, and perhaps for little benefit, Congress might well prefer that courts decline jurisdiction. (Although its enactment of statutes limiting executive power in the area of national security suggests otherwise.) Furthermore, courts have long asserted that they have some discretion about whether to hear cases that Congress has assigned to them, and have often chosen to abstain or defer to some other political institution

111. *See supra* note 8 and accompanying text.

rather than reach out and decide a matter that is technically within their purview.[112] Thus, simply because courts have authority to hear cases challenging executive action does not mean that they are constitutionally required to do so. It does suggest, however, that courts should examine more closely the role that the federal judiciary and Congress play in working together to check executive authority before granting executive demands to dismiss these cases.

2. Congressional Reliance on the Courts to Police the Executive's "War on Terror"

Congress has been criticized for failing to enact legislation that would clarify the legality of executive action in the war on terror, and for leaving these hard questions for the courts to struggle with alone.[113] For example, the Senate Judiciary Committee was accused of ducking responsibility for its proposal to send questions about the constitutionality of the warrantless surveillance program to the Foreign Intelligence Surveillance Court,[114] and Congress failed to pass any legislation in response to that controversial executive practice. During three years of contentious litigation over the legality of detentions at Guantanamo Bay, Congress remained silent while the executive branch, detainees, and courts struggled with the question whether the detentions were permitted by the Authorized Use of Military Force Act, which was passed shortly after September 11, 2001. After judicial prodding,[115] Congress did enact legislation expressly addressing the treatment of Guantanamo Bay detainees, first in the Detainee Treatment Act of 2005 and then in the Military Commissions Act of 2006, but it has left most aspects of the executive's war on terror untouched. In short, Congress's supervision of the executive branch's conduct in the war on

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112. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985) (describing when courts may appropriately refuse to hear cases over which they have jurisdiction).

113. *See, e.g.*, Kenneth Anderson, *It's Congress's War, Too*, N.Y. Times, Sep. 3, 2006, § 6 (Magazine), at 20 (arguing that Congress can no longer avoid legislating in the fight against global terrorism). For a more detailed discussion of Professor Kenneth Anderson's views, see Kenneth Anderson, *Law and Terror*, Pol'y Rev., Oct.-Nov. 2006, at 3.

114. Eric Lichtblau, *Administration and Critics, in Senate Testimony, Clash Over Eavesdropping Compromise*, N.Y. Times, July 27, 2006, at A21.

115. The Supreme Court repeatedly invited Congress to enact legislation addressing the rights of Guantanomo Bay detainees. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.").

terror has been far from comprehensive, and has often relied on judicial review as the backstop for aggressive assertions of executive power.[116]

Congress's deliberate use of the courts as a check on abuse of executive power should be a factor in the court's analysis of the state secrets privilege. Courts should always be cautious when faced with executive assertion of the privilege, but they should be especially reluctant to dismiss entire categories of challenges to executive actions that Congress intended them to hear. By declining to hear these cases, courts are not just diminishing their own role in the constitutional structure, they are eliminating a constitutionally prescribed method through which Congress can curb the executive.

Of course, Congress could check the executive almost entirely on its own, without judicial assistance. Congress can hold hearings at which it closely questions executive officers about their actions and demands an accounting of executive conduct. Congress can enact laws prohibiting some types of executive action, although it may have to do so over an executive veto. In the most extreme circumstances, Congress can seek to impeach the President for acting extra-constitutionally. These alternative methods of checking the executive are not without costs for Congress, however. They set up an unmediated showdown between these two powerful branches of government, and lead to the kind of infighting and partisan wrangling that has been demonstrated to alienate the public. Perhaps for these reasons, Congress has been slow to enact legislation to address the war on terror despite repeated calls for it to do so. Instead, Congress has turned to the courts, heightening the judicial obligation to entertain legal challenges to executive conduct.

III. PUTTING THEORY INTO PRACTICE: SUGGESTED JUDICIAL RESPONSES TO THE EXECUTIVE'S ASSERTION OF THE STATE SECRETS PRIVILEGE

Part II sought to establish a few basic propositions. First, that the executive's invocation of the state secrets privilege as grounds for dismissing certain categories of cases is akin to claiming that courts lack jurisdiction to hear these cases. Second, by doing so, the executive diminishes not just judicial power, but congressional power as well, because Congress normally controls federal jurisdiction. And third, Congress's grant of federal jurisdiction over claims challenging the legality of executive action has added significance as a congressional-judicial collaboration intended to prevent the executive from overreaching. This

116. Senator Arlen Specter, who voted for the Military Commissions Act, has stated that he believed (and hoped) that the courts would hold significant aspects of those laws to be unconstitutional. *See* Jeffrey Toobin, *Killing Habeas Corpus*, New Yorker, Dec. 4, 2006, at 46 (describing Senator Specter's belief that the "courts will invalidate" the provision of the Military Commissions Act that strips the federal courts of jurisdiction over habeas corpus petitions filed by detainees in U.S. custody).

part discusses how these conclusions should shape judicial analysis of the executive's efforts to obtain blanket dismissals on state secrets grounds.

A. *Courts Should be Especially Reluctant to Dismiss When the Executive Is Seeking to Prevent Judicial Review of All Constitutional Challenges to Specific Executive Programs*

Courts should be particularly hesitant to forgo jurisdiction when the executive is seeking an across-the-board dismissal of all cases challenging particular executive branch programs, because such claims implicate Congress's constitutional authority, as well as the courts'. Congress has delegated part of its executive oversight function to the judiciary, and thus courts should not be as quick to leave the field as they might be were that checking function not at issue. In short, judges should adopt a more holistic view in such cases by taking into account the effect that blanket dismissals will have on the relationship between the three branches of government.

Courts need not ignore executive concerns, however. There are many steps short of outright dismissal that judges can adopt to protect state secrets from public disclosure. Courts should attempt to respond to the executive's claim of privilege by narrowing discovery, providing for discovery under seal, or modifying plaintiff's claims—all steps that have been taken by courts in previous cases.[117] At the very least, judges should allow discovery to proceed in some fashion before deciding whether the "very subject matter" of the case requires its dismissal. A case may still be able to go forward without requiring the executive to disclose details of programs designed to protect national security.

B. *An Alternative to Outright Dismissal: Transferring Executive Oversight Back to Congress*

If, however, a judge is genuinely convinced that state secrets are implicated by the subject matter of a lawsuit to a degree that requires its dismissal, then she might consider transferring the task of curbing executive power back to Congress.

Legal scholars have written extensively on judicial discretion to accept or reject jurisdiction. Some claim that courts have very little leeway to refuse to hear a case over which the Constitution and Congress grant it subject matter jurisdiction,[118] while others assert that courts have historically had some latitude to accept or reject jurisdiction, and should continue to exercise this discretion within reasonable boundaries.[119] Although the latter view is more widely accepted, no one contends that courts are free to pick and choose their caseload.

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117. *See* Weaver & Pallitto, *supra* note 2, at 86.

118. *See, e.g.*, Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71 (1984).

119. *See, e.g.*, Shapiro, *supra* note 110.

When a court exercises its discretion to forgo jurisdiction, it sometimes justifies doing so on the ground that another arm of government is better situated to address the matter. So, for example, a court may abstain when faced with an unclear state law that appears to transgress constitutional boundaries, but only after sending a question about the meaning of state law to the state court (or by directing the parties to bring their litigation before a state tribunal).[120] When a court engages in this type of abstention—referred to as *Pullman* abstention after the first case in which the Supreme Court advocated this course of conduct—it is not abandoning the field and leaving the litigants without recourse for their constitutional claim. Rather, the court is suggesting to the parties that there is a more appropriate institution to address the problem in the first instance—the state courts, which are more familiar with state law and will perhaps construe that law in ways that prevent a court from ever having to reach the constitutional problem. The *Chevron* deference that courts routinely grant to agencies' interpretation of their governing statutes provides another significant example of the abdication of judicial power to a political institution that is better suited to resolve the issue.[121]

Similarly, if a court concludes that the state secrets privilege applies such that the dispute is not appropriately resolved in a judicial forum, it should consider sending the legal question to a more suitable decision maker—namely, Congress. Congress has the power to curb the executive through oversight hearings, the enactment of new laws reining in executive action, the withdrawal of funds, and impeachment. If a court is not the proper institution to delve into the constitutionality of executive conduct because its inquiry would jeopardize national security, then Congress can take over that task. Moreover, because Congress was responsible for assigning jurisdiction to the court in the first instance, it makes sense to return to Congress with a dispute that a court has decided is not fit for judicial review.[122]

Admittedly, transferring oversight from the courts back to Congress is logistically complicated and, some might argue, constitutionally suspect. If Congress is already investigating the executive conduct in question, however, a judge need not do anything more than stay the case and await further developments—an act of restraint that is surely constitutionally permissible. But if Congress has not yet given the issue its attention, the court would have to seek Congress's involvement by instructing the executive branch officials in the case before it to bring the issue to

120. *See* Fallon et al., *supra* note 4, at 1186-1213.

121. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

122. *Cf.* Amanda Frost, *Certifying Questions to Congress*, 101 Nw. U. L. Rev. (forthcoming 2007) (manuscript at 45-52), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896794 (discussing Congress's institutional superiority over courts in resolving questions about the meaning of truly ambiguous statutes).

Congress's intention, or even by contacting Congress itself and requesting that it take over executive oversight. Whichever course of action the court took to gain Congress's attention, it could then stay the case without removing it from its docket while awaiting a congressional response.

Such direct judicial interaction with Congress concededly comes close to the constitutional line that separates judging from legislating. Yet even though this type of congressional-judicial interaction is atypical, it is not unprecedented. Judges on occasion issue opinions asking Congress to fix a poorly drafted statute, and at least one appellate panel sent its opinion to the House and Senate Judiciary Committees in the hope of inspiring Congress to amend the legislation at issue in the case.[123] Furthermore, the executive's claim that courts must dismiss all cases challenging the legality of specific government programs is also remarkable, and thus merits a similarly unusual judicial response.

Of course, the executive branch may object to sharing information concerning national security with members of Congress, just as it does to providing that information to judges and plaintiffs. But most Presidents have accepted (albeit reluctantly) that they need to keep Congress informed about executive branch programs and policies regarding national security, and they instruct their staffs to give at least some information about ongoing programs and policies to Congress. The President's staff regularly briefs members of the House and Senate Defense Committees in closed-door sessions, where they provide these committees' members with classified information that the executive branch would not similarly share with a plaintiff or a judge.[124]

Moreover, members of Congress can demand that the executive keep relevant committees informed about national security programs. For example, the National Security Act requires the executive to submit written reports to congressional intelligence committees, and these committees regularly seek information about intelligence gathering and national security issues from the executive. The current President contends, however, that he has inherent constitutional authority to withhold classified information under some circumstances. President Bush has stated that he

123. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2624 (2005) (noting that 28 U.S.C. § 1367 may contain an "unintentional drafting gap" but concluding that "[i]f that is the case, it is up to Congress rather than the courts to fix it" (internal quotation marks omitted)); Gustafson v. Alloyd Co., 513 U.S. 561, 603-04 (1995) (Ginsburg, J., dissenting) ("If adjustment [of the statute] is in order, as the Court's opinion powerfully suggests it is, Congress is equipped to undertake the alteration." (footnote omitted)); Reves v. Ernst & Young, 494 U.S. 56, 63 n.2 (1990) ("If Congress erred, however, it is for that body, and not this Court, to correct its mistake."); Abdul-Malik v. Hawk-Sawyer, 403 F.3d 72, 76 (2d Cir. 2005) (noting that circuit courts have disagreed over the meaning of federal sentencing statutes and directing the Clerk of the Court to forward the opinion to the Chairs and Ranking Members of the House and Senate Judiciary Committees). For a more detailed discussion of the method by which courts and Congress communicate during pending cases, see *infra* Part III.B.

124. *See* P. Stephen Gidiere III, The Federal Information Manual 102-04 (2006).

would construe the National Security Act's disclosure requirement "in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, [or] the national security."[125] Congress has responded to such statements by noting that, like the executive, Congress has the constitutionally assigned responsibility to safeguard the nation, and it is empowered to declare war and establish and fund intelligence gathering.[126] Although the issue is a contentious one, the executive has rarely held out against sustained congressional efforts to obtain information about the executive's national security activities.

But what should the judiciary do if the executive was able to obstruct congressional investigations? A court could inquire into the degree of the executive's cooperation with Congress by asking the executive to disclose to the court whether it has provided the information asked of it by Congress, and whether Congress is satisfied with its level of cooperation. The plaintiff's counsel might also give his or her views about the quality of congressional oversight. And members of Congress on the relevant oversight committees might choose to inform the court as to whether they are satisfied with the executive's response. The court could then weigh this information when considering whether to dismiss the case entirely or, alternatively, lift the stay and continue with the litigation.[127]

These proposed judicial communications with the other branches are not a threat to the separation of powers. Judges could only request, not demand, that Congress take up the task of executive oversight and that the executive cooperate with a congressional investigation; the other two branches are free to ignore judicial efforts to transfer executive oversight

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125. Press Release, White House, President Signs Intelligence Authorization Act (Dec. 28, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/12/20011228-3.html.

126. *See Disclosure of Classified Information to Congress: Hearings Before the Select Comm. on Intelligence of the U.S. Senate*, 105th Cong. 5 (1998) (statement by Sen. Richard C. Shelby) ("The issue before us is whether the Congress and the President share constitutional authority over the regulation of classified information. As one might expect, the Administration has asserted that the President has ultimate and unimpeded authority over the collection, retention, and dissemination of national security information. We disagree. While the Constitution grants the President, as Commander-in-Chief, the authority to regulate classified information, this grant of authority is by no means exclusive."); *see also* Chesney, *supra* note 2, at 61 (stating that the executive must provide some information relating to national defense and diplomacy to Congress, but noting that "the line between that which [the executive] may [withhold from Congress] and that which it may not is notoriously disputed").

127. Congress could also insist that the judicial branch hear these cases despite executive assertions of the state secrets privilege. The state secrets privilege has been described as consisting of a "potentially-inalterable constitutional core surrounded by a revisable common law shell." *See* Chesney, *supra* note 2, at 61. Accordingly, Congress could legislatively override the privilege but provide additional procedural protections to safeguard information related to national security. For example, as Professor Chesney suggests, Congress could require that such cases be heard in a classified forum akin to the Foreign Intelligence Surveillance Court. *See id.* at 63; *see also* Halpern v. United States, 258 F.2d 36 (2d Cir. 1958) (ordering that the courtroom be closed to the public in order to protect national security).

back to Congress. Moreover, these admittedly exceptional judicial referrals to Congress are justified by the executive's extraordinary demand that courts relinquish their statutory and constitutional obligation to hear challenges to executive action. Finally, the Bush Administration has suggested to the courts that the legality of its conduct in the war on terror should be resolved by the "political branches," which comes close to inviting congressional involvement in these pending cases. Under such circumstances, the judiciary is justified in bringing Congress's attention to the matter rather than simply dismissing a case Congress intended it to hear.

C. *The Judicial Response Should Congress Fail Effectively to Oversee the Executive*

Concededly, judicial efforts to focus Congress's attention on the dispute may fail. Congress may choose not to do much in the way of oversight, trusting that the executive is acting within constitutional limits and unwilling to push for detailed information about programs that concern national security. Or Congress may attempt to examine executive conduct, only to be stymied by the executive's refusal to cooperate. If Congress appears unwilling or unable to inquire into the legality of executive conduct, however, then the judiciary's obligation to review that conduct is all the stronger.

Despite the rhetoric found in many judicial decisions—most notably *Marbury v. Madison*[128]—our system of government cannot guarantee a remedy for every constitutional violation. As Professors Richard Fallon and Daniel Meltzer have written, competing values and practical considerations prevent courts from granting a full and complete relief for the abrogation of constitutional rights in certain circumstances.[129] Yet even though our constitutional structure tolerates the occasional unredressed injury, it nonetheless "demands a system of constitutional remedies adequate to keep government generally within the bounds of law."[130] Thus, the executive's assertion of the state secrets privilege in an individual personal injury case—such as *United States v. Reynolds*—calls for a different judicial response than the blanket assertion of the same privilege to prevent judicial review of entire categories of executive conduct. In *Reynolds*, the Supreme Court concluded that the plaintiffs' ability to obtain compensation for possible government negligence must be sacrificed to

128. 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

129. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1778 (1991) ("[W]e begin by locating *Marbury*'s assertion in its historical and institutional context, within which the principle of a remedy for every rights violation cannot plausibly claim status as an unyielding imperative.").

130. *Id.* at 1778-79.

prevent the release of a document that could jeopardize national security. That calculus should come out differently when the executive is seeking to remove all of the constitutionally-provided checks on its conduct.

For these reasons, when litigants challenge an executive branch program on the ground that it constitutes an abuse of executive power, courts should hesitate to abandon the field unless Congress is willing to step in. I propose this as a general principle, however, and not an ironclad rule. In some rare circumstances, when the nation is under grave threat of imminent and wide-scale attack, the executive should be given more latitude, at least for a time, without having to explain itself. But when the executive is engaged in constitutionally questionable conduct that lasts for a period of years, and occurs during a time when the nation's populace is relatively safe, our constitutional structure demands that it be subject to oversight from either the courts or Congress.

CONCLUSION

When the executive seeks dismissal of a case on state secrets grounds, the judiciary usually reacts as if it has a binary choice: to dismiss the case, or to continue to hear it. But even if a court agrees with the executive that the subject matter of a case raises questions that cannot be answered without disclosing state secrets, the court should not assume that dismissal is its only option. There is an alternative: The judge could issue a stay and inform the parties that she will continue to abstain only if she is convinced that Congress will take back the oversight role that it delegated to the courts when it granted jurisdiction over cases challenging the legality of executive action.

Indeed, this Essay posits that when the executive attempts to dismiss all challenges to specific executive branch programs, courts have an obligation not to abandon the field without first attempting to delegate the oversight function back to Congress. The benefit of this approach is that it defers to the executive's view that a private citizen's lawsuit should not be allowed to jeopardize national security, and it takes courts out of the untenable position of demanding disclosure of information that the executive contends would endanger the nation. Furthermore, it accepts the executive's claim that the issues at the heart of the litigation should be resolved by the political branches of government, not the courts. Yet it does so without permitting the executive to evade the oversight our tripartite system of government generally requires. Although the judiciary need not be the institution performing the checking function, it is vital that some institution does.

The principle at work here is loosely related to Justice Jackson's classic articulation of the relationship between the three branches in the *Steel Seizure* case. Justice Jackson declared, "When the President takes measures incompatible with the express or implied will of Congress, his power is at

its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[131] Conversely, the President's power is at its broadest when he acts with Congress's imprimatur, and falls somewhere between those two poles when Congress is silent on the matter.

This Essay's proposal—that courts should first determine whether Congress is willing and able to engage in executive oversight before dismissing entire categories of cases challenging executive conduct—is rooted in the same constitutional structure of checks and balances that inspired Justice Jackson's three-tiered view of executive power. The three branches not only share power, they also share a responsibility to curb the excesses of the others. To keep this delicate balance, a court should consider whether Congress can perform that task before it bows out, and should be more reluctant to do so if Congress cannot, or if the executive is obstructing congressional oversight. In other words, courts should not give up their constitutional role as a check on the executive unless another branch that shares that role is able to take over.

131. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952) (Jackson, J., concurring).